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Supreme Court, U.S.
FILED
MAY 19 1997
OFFICE OF THE CLERK

No. 96-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANTHONY W. CVELBAR,

Petitioner,

v.

CBI-ILLINOIS, INC.,
a Delaware corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL APPENDIX

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[Dated February 27, 1996]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANTHONY W. CVELBAR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-1127
	)	
CBI-ILLINOIS, INC., a Delaware Corporation,	)	
	)	
Defendant.	)	

ORDER

On June 20, 1995, Plaintiff, Anthony Cvelbar, filed a one-count Amended Complaint charging that Defendant, CBI-Illinois, Inc. ("CBI"), violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* Specifically, Cvelbar claims that the CBI's decision to limit his benefits was wrongful under 29 U.S.C. § 1132(a)(1)(B). CBI moved for summary judgment, arguing that under *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989), it had not behaved arbitrarily or capriciously.

On January 16, 1996, this Court entered partial summary judgment in favor of CBI. In that Order, this Court found that CBI had not acted either arbitrarily or capriciously in deeming Cvelbar's severance payments as contingent upon a change in ownership or control. Cvelbar filed a Motion to Amend under Fed.R.Civ.P. 59(e), which this Court denied. On February 7, 1996, this Court ordered the parties to file status reports indicating what

issues, if any, remained to be litigated. CBI's status report states that no issues remain and that final judgment should be entered on its behalf.

Cvelbar, on the other hand, argues that this Court must determine what part of the payments he received are "parachute payments." He depends, at least in part, on the fact that CBI sought a revenue ruling from the IRS. After paying some portion of Cvelbar's severance benefits, CBI sought a ruling from the IRS on the issue of whether the entire amount paid to him constituted a "parachute payment" under § 280G of the Internal Revenue Code. The IRS responded that a portion of the payments could be allocated to the covenant not to compete and avoid the label of "parachute payment". As a result, Cvelbar believes that this Court must determine the value of the covenant not to compete he entered into with CBI. Cvelbar is mistaken.

In the Order granting partial summary judgment in favor of CBI, this Court pointed out that this case arises from ERISA, not the Internal Revenue Code. The only issue before this Court in a claim for wrongful denial of benefits under § 1132(a)(1)(B) is whether the plan administrator acted either arbitrarily or capriciously. This Court held, at summary judgment, that Cvelbar failed to meet his burden as the non-movant in presenting evidence which created a genuine issue of material fact with regard to CBI's alleged wrongful conduct. This decision has nothing to do with whether the IRS has allowed CBI, for tax purposes, to allocate a portion of the severance payments to the covenant not to compete.

The Order of January 16, 1996 resolved all remaining issues in the case. This Court ORDERS the Clerk to

enter Final Judgement in favor of CBI-Illinois, Inc. FURTHER, this Court finds the Motion to Extend Time [#32] and the Amended Motion for Discovery [#42] MOOT. This matter is TERMINATED.

ENTERED this 27th day of February, 1996.

/s/_____
Michael M. Mihm
Chief United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JUDGMENT IN A CIVIL CASE

ANTHONY W. CVELBAR,

vs. Case No. 95-1127

CBI ILLINOIS, INC, a Delaware Corporation; COMMERCE BANCSHARES INC., a Missouri Corporation; COMMERCE BANK N.A.; DAVID KEMPER, President of Commerce Bancshares, Inc.; G. ROLAND RANSOM, Vice President, Commerce Bancshares, Inc.; PETER CALLOW, President of Commerce Bank, N.A.

☒ DECISION BY THE COURT. This action came to hearing before the Court. The issues have been plead and heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and against Plaintiff plus costs.

ENTER this 27th day of February, 1996.

JOHN M. WATERS, CLERK

/s/_____
BY DEPUTY CLERK

[Dated February 7, 1996]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANTHONY W. CVELBAR, Plaintiff,	)	
v.	)	Case No. 95-1127
CBI-ILLINOIS, a Delaware Corporation, Defendant.	)	

MEMORANDUM OPINION

Before this Court is Plaintiff's Motion to Amend Pursuant to Rule 59(e). On January 16, 1996, this Court entered an Order granting in part and denying in part Defendant, CBI-Illinois' ("CBI"), Motion for Partial Summary Judgment. During the analysis, this Court determined that one of the issues presented by the parties could not be ruled upon, as it would constitute an advisory opinion. Cvelbar asks this Court to revisit its summary judgment decision and rule on the issue of whether or not the severance benefits paid to him by CBI constitute a "golden parachute" as defined by § 280G of the Internal Revenue Code. This Court DENIES the Motion to Amend.

A Motion to Amend pursuant to Federal Rule 59(e), is for all intents and purposes, a motion to reconsider. *See Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 652 (7th Cir. 1984). A motion to reconsider is only avail-

able to "correct manifest errors of law or fact or to present newly discovered evidence." *Publishers Resource Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (quoting *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665-66 (N.D.Ill. 1982)). Motions to reconsider are not to be used to "rehash" the arguments presented during the motion for summary judgment. *In re Oil Spill by "Amoco Cadiz"* 794 F.Supp. 261, 267 (N.D.Ill. 1992).

Cvelbar does not assert that this Court's ruling contains a manifest error of law or fact. He contends that this Court should have ruled on the issue of whether his employee benefits constituted a "golden parachute" because the Employer-Employee Agreement ("Agreement") should be interpreted by reference to § 280G of the Internal Revenue Code. Cvelbar's error is that the Agreement does not require CBI to determine if the payments are in fact "parachute payments" as defined in § 280G. The Agreement gave CBI sole authority to deem the payments "contingent upon a change in ownership or control." This Court utilized both § 280G of the Code and the Proposed Regulations to determine whether CBI acted arbitrarily or capriciously under the terms of the Agreement. This Court stands by its holding that the issue of whether the severance payments did, in fact, constitute "golden parachute" payments as defined by the Internal Revenue Code is not relevant to the issues presented in the Complaint.

Conclusion

For the reasons stated herein, this Court DENIES the Motion to Amend.

ENTERED this 7th day of February, 1996.

/s/_____
Michael M. Mihm
Chief United States District Judge

[Dated January 16, 1996]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ANTHONY W. CVELBAR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 95-1127
	)	
CBI-ILLINOIS, a Delaware Corporation,	)	
	)	
	)	
Defendant.	)	

ORDER

Before this Court are Plaintiff's Motion for Partial Summary Judgment [10], Defendant's Motion for Partial Summary Judgment [15], and Plaintiff's Motion to Strike [24]. For the reasons set forth herein, the Plaintiff's Motion for Partial Summary Judgment is DENIED, the Defendant's Motion for Partial Summary Judgment is GRANTED, and the Plaintiff's Motion to Strike is DENIED.

Factual Background

Each of the parties has submitted Statements of Undisputed Facts and Statements of Disputed Facts. A background of the case was culled from all of the available documents. Plaintiff, Anthony W. Cvelbar (hereinafter "Cvelbar"), worked as the Executive Vice President for The First National Bank of Peoria, which operated as a wholly-owned subsidiary of First Peoria Corporation (hereinafter "First Peoria"). In March 1990, Cvelbar en-

tered into an Employer-Employee Agreement (hereinafter "Agreement") with First Peoria. The Agreement provides, in relevant part, as follows:

> In order to induce the Employee to remain in the employ of the Bank and its successors and not to seek employment with a competitor of the Company or the Bank within three years of termination of employment, the Agreement sets forth the severance benefits which the Company agrees will be provided to the Employee in the event that the Employee's employment with the Bank is terminated within the term of this Agreement, whether voluntary or involuntary.
>
> * * *
>
> 2. Employee's Agreement Not to Compete
>
> The Employee agrees that for a period of three years from the date of termination, the Employee will not become employed as an agent, consultant, employee, officer or director of (i) a commercial bank . . . located in the Standard Metropolitan Statistical Area encompassing the City of Peoria, Illinois. . . . If the employee breaches the terms of this paragraph, the Agreement shall terminate, no payments or benefits shall become payable thereafter, and all payments made under this Agreement shall be refunded by the Employee to the Company.
>
> 3. Certain Benefits Upon Termination
>
> A. If, within the term of this Agreement, the Employee's employment with the Company or Bank is terminated for any reason other than (a) death, (b) retirement, (c) the commission of a felony by the Employee or (d) the willful engaging by the Employee in acts constituting fraud, then the Employee shall be entitled to the benefits provided below upon termination of his employment.

* * *

4. Limitation on Amounts Payable

A. Notwithstanding anything contained in this Agreement to the contrary, in the event any payment to be made or benefit to be provided to the Employee pursuant to this Agreement is deemed, in the sole opinion of Company's counsel, to be contingent on a "change in ownership or control" or otherwise would be subject to the provisions of Section 280G of the Internal Revenue Code of 1986, as amended (the Code), then the total amount of payments or benefits to be provided to the Employee pursuant to this Agreement shall be reduced so that the aggregate present value of all said payments does not exceed 299% of the Employee's Average Annual Compensation as Defined by the Code.

(Exhibit 1 to Defendant's Statement of Undisputed Facts).

On or about June 1, 1992, First Peoria merged with Defendant CBI-Illinois. (hereinafter "CBI"). Cvelbar admits that this merger constituted a "change of ownership or control." (Response Mem. to Defendant's Motion for Summary Judgment, at 2). A Plan of Merger dated December 6, 1991 governed the merger and provided that CBI expressly assumed First Peoria's obligations under the Agreement. CBI terminated Cvelbar in October 1992. The parties do not dispute that the Agreement is binding upon CBI. CBI made payments under the Agreement until December 1994, at which time it ceased making payments. CBI claims that no additional payments are due to Cvelbar.

In the case at bar, Cvelbar filed a one-count Amended Complaint on June 20, 1995. In his Complaint, Cvelbar alleges that CBI violated the Employee Retirement In-

come Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* In his Complaint, Cvelbar asserts that the Agreement constitutes an employee benefit plan and that CBI is the administrator of the "plan." In its Answer, CBI denies each of these allegations, but for purposes of its Motion for Summary Judgment assumes these assertions are true. Cvelbar claims that the cessation of payments in December 1994 was erroneous and wrongful under 29 U.S.C. § 1132(a)(1)(B). This Court's jurisdiction arises pursuant to 28 U.S.C. § 1331.

Discussion

A. *Motions for Partial Summary Judgment*

A motion for summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the responsibility of informing the court of portions of the record or affidavits that demonstrate the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.*, at 325, 106 S.Ct. at 2553. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir. 1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 106 S.Ct. 1348, 1355-56 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. at 2553. This Court must then determine whether there is a need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Anderson*, 477 U.S. at 250, 106 S.Ct. at 2511.

In support of Cvelbar's Motion for Partial Summary Judgment, he submits the following arguments: (1) the Agreement does not constitute a "golden parachute" under § 280G of the Internal Revenue Code and (2) if this Court determines that the Agreement is a "golden parachute", the Defendant breached an implied covenant of good faith and fair dealing. The Defendant argues as follows: (1) that pursuant to § 280G, the Agreement is a "golden parachute" and (2) it acted in good faith.

It is important to note at the outset that this lawsuit arises under ERISA's civil enforcement provision, § 1132, which provides that a plan participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). As Cvelbar's claim for severance benefits is essentially a matter of contract interpretation, *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1389 (7th Cir. 1993) special attention must be paid to the terms of the plan. If the terms of the Agreement are unambiguous as a matter of law, no extrinsic evidence may be considered. *Id.* Summary judgment is not

appropriate unless the "pertinent provisions of the contractual documents are unambiguous." *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602 (7th Cir. 1989).

In the case at bar, the Agreement provided in a section entitled "Limitation on Amounts Payable" that:

> [I]n the event any payment to be made . . . to the Employee . . . is deemed, **in the sole opinion of Company's counsel,** to be contingent on a "change in ownership or control" . . . then the total amount of payments or benefits to be provided . . . shall be reduced so that the aggregate present value of all said payments does not exceed 299% of the Employee's Average Annual Compensation . . .

(Exhibit 1 to Defendant's Statement of Undisputed Facts) (emphasis added). This language clearly vests in the corporate counsel an authority to deem certain payments to be contingent upon a change in ownership. This language is not subject to "'reasonable alternative interpretations,'" and therefore is unambiguous. *Hickey*, 995 F.2d at 1389 (quoting *Taylor v. Continental Group*, 933 F.2d 1227, 1232 (3d Cir. 1991)). No extrinsic evidence will be considered in resolving this facet of the Motions for Summary Judgment. *Ryan, supra* at 602.

Although the parties have comprehensively briefed the issue of whether Cvelbar's severance package was "contingent on a change in ownership or control," the first issue which must be addressed is what rights Cvelbar may enforce under the Agreement. It is beyond cavil that Cvelbar may not seek to enforce, through § 1132(a)(1)(B), rights not conferred upon him by the Agreement. Cvelbar's right to the benefits enumerated in paragraph 3(A) of the Agreement are limited by the operation of paragraph 4. Paragraph 4 essentially provides that, notwith-

standing any other terms in the Agreement, if the Company's counsel deems the payments to Cvelbar to be contingent upon a change in ownership or control, Cvelbar is only entitled to 299% of his Average Annual Compensation. The Company's in-house counsel, James Swarts, deemed the payments to Cvelbar to be contingent upon a change in ownership or control. To this extent, the Agreement entitles Cvelbar to no more than 299% of his Average Annual Compensation.

In resolving the parties' Motions for Summary Judgment, it is not relevant whether the severance payments are in fact parachute payments. The Complaint seeks relief due to the alleged wrongful denial of benefits. Whether the payments made to Cvelbar are "parachute payments," as defined in § 280G of the Code, is not germane to the issues presented in the Complaint. The Agreement provides that once CBI deems the payments contingent upon a change in ownership or control, Cvelbar is only entitled to 299% of his Average Annual Compensation. This Court will not enter summary judgment in favor of either party on this matter, as it would constitute an advisory opinion.

Cvelbar also argues that the Agreement contains an implied covenant of good faith and fair dealing and that CBI breached that implied covenant. In support of this argument, Cvelbar cites *Capital Options Investments, Inc. v. Goldberg Bros. Commodities, Inc.*, 958 F.2d 186 (7th Cir. 1992), and *Tektel, Inc. v. Maier*, 813 F.Supp. 1331 (N.D.Ill. 1992). Neither *Capital Options* nor *Tektel* arise under ERISA and, therefore, are inapplicable to the case at bar.

In response to Cvelbar's good faith argument, CBI asserts that this Court must utilize the standard of review

set forth by ERISA case law. CBI is correct. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 956-57 (1989), the Court held that in an action arising under § 1132(a)(1)(B) a district court's review of the denial of benefits under an ERISA plan is *de novo* unless the plan gives the administrator discretion to determine benefits eligibility. In the case at bar, there is no dispute that the Agreement gave the Defendant sole discretion to determine whether the benefits paid were contingent upon a change in ownership or control. Thus, this Court reviews the discretionary decision of CBI under an arbitrary and capricious standard. *Loyola University of Chicago v. Humana Ins. Co.*, 996 F.2d 895, 898 (7th Cir. 1993) ("In the event that the administrator's discretion is unrestrained or limited only by the requirement of good faith, the arbitrary and capricious standard of review is proper."). The arbitrary and capricious standard includes a requirement of good faith. *Reilly v. Blue Cross and Blue Shield United of Wisconsin*, 846 F.2d 416, 419 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988).

CBI moves for summary judgment on the issue of whether it acted in bad faith. At summary judgment, it is not sufficient for the plaintiff to simply allege bad faith. The non-movant must offer some evidentiary support for that assertion. *Allison v. Dugan*, 951 F.2d 828, 833 (7th Cir. 1992). Once CBI has "pointed out to the district court—that there is an absence of evidence to support the non-moving party's case," *Celotex*, *supra* at 325, the burden shifts to Cvelbar to demonstrate that the record contains evidence from which a jury could find that CBI acted in bad faith. *Anderson*, *supra* at 252. Cvelbar has failed to provide this Court with any evidence, other than his own deposition, that the CBI acted in bad faith regarding the characterization of his sever-

ance payments. Thus, "there can be no 'genuine issue of material fact,' since a complete failure of proof concerning an essential element of a non-moving party's case necessarily renders all other fact immaterial." *Celotex*, *supra* at 323. This Court will enter summary judgment in favor of CBI on the issue of bad faith.

This being said, however, the review is not complete. CBI also moves for summary judgment on the issue of whether its decision to deem the severance payments as "contingent upon a change in ownership or control" was arbitrary or capricious. The Internal Revenue Service's Proposed Regulations provide some insight on this issue. The Proposed Regulations, found in the *Federal Tax Coordinator 2d*, ¶ 151,143, state:

> In general, a payment will be treated as contingent on a change in ownership or control if the payment would not in fact have been made had no change in ownership or control occurred. A payment generally will be treated as one which would not in fact have been made in the absence of a change in ownership or control unless it is substantially certain, at the time of the change, that the payment would have been made whether or not the change occurred.

Additionally, a payment will be treated as contingent on a change in ownership or control "if (a) the payment is contingent on an event that is closely associated with such a change, (b) a change in ownership or control actually occurs, and (c) the event is materially related to the change in ownership or control."

The Proposed Regulations indicate that the termination of a disqualified individual's employment is considered to be "closely associated" with a change in ownership or control. Cvelbar asserts that he is not a disqualified individual within the meaning of the Internal Rev-

enue Code. This is not relevant. The only reason this Court is reviewing the Proposed Regulations is to determine whether CBI's decision to deem the payments "contingent" was arbitrary or capricious. Cvelbar was clearly a key employee in the bank, as he functioned as the executive vice president and was one of only a handful of employees who were given severance agreements. It is neither arbitrary nor capricious to deem a key employee's termination, which occurred approximately four months after the merger, as "closely associated" with a change in ownership or control.

There is no question that a change in ownership or control actually occurred. Thus, the only remaining issue is whether Cvelbar's termination was "materially related" to the merger. The affidavit of Peter Callow indicates that he decided to terminate Cvelbar and that the primary reason for this decision was that Cvelbar exhibited a negative attitude toward the new ownership. In response to these statements, Cvelbar represents that his personnel file contains no reprimands or other negative comments. This assertion of Cvelbar's is not sufficient to create a genuine issue of material fact regarding the material relationship between his termination and the merger. Callow's decision to terminate Cvelbar is materially related to the change in ownership and control. Nothing submitted by Cvelbar, as the non-movant, establishes a genuine issue of material fact on this point. Therefore, this Court finds that CBI did not act arbitrarily or capriciously in deeming Cvelbar's severance payments to be "contingent upon a change in ownership or control."

B. *Motion to Strike*

Cvelbar moves to strike the affidavits of William H. Christianson, James L. Swarts, and Peter W. Callow. Cvelbar asserts that paragraph 6 of Christianson's affidavit violates the parole evidence rule. Cvelbar seeks to strike the entire affidavit of James L. Swarts and paragraph 7 of Peter Callow's affidavit.

In Christianson's affidavit, he states that the severance Agreement was made to "protect [Cvelbar] from adverse consequences arising out of possible changes in ownership or control." (Christianson Aff., at 2). The Agreement clearly protects Cvelbar from any termination, voluntary or involuntary, including termination due to a change in ownership or control. Therefore, the affidavit does not actually conflict with the Agreement. However, to the extent that it contradicts the unambiguous terms of the Agreement, it has been disregarded by this Court.

The only statement this Court considered from the Swarts affidavit was that, as Company counsel, he deemed the severance payments to be contingent upon a change in ownership or control. Cvelbar does not contest this fact, but instead argues that such a determination was an abuse of discretion. The Motion to Strike is denied as to the Swarts affidavit.

In Peter Callow's affidavit, he states that he terminated Cvelbar because he exhibited a negative attitude toward new management. Cvelbar moves to strike this statement because it violates 820 ILCS 40/4. This Illinois Statute provides that "[p]ersonnel records information which was not included in the personnel record but should have been as required by this Act shall not be used by an employer in a judicial or quasi-judicial proceeding." 820 ILCS 40/4. There is no indication from this

Court's review of the Act that an employer must record its determination that an employee was terminated due to his or her negative attitude. Therefore, this statute is inapplicable to the case at bar, and the Motion to Strike is denied as to paragraph 7 of Callow's affidavit.

Conclusion

For the reasons stated herein, Plaintiff's Motion for Partial Summary Judgment is DENIED in part on the merits and DENIED in part because this Court declines to issue an advisory opinion. Defendant's Motion for Partial Summary Judgment is GRANTED in part on the merits and DENIED in part because this Court declines to issue an advisory opinion. Partial Summary Judgment should be entered in favor of Defendant, CBI, and against Plaintiff, Anthony W. Cvelbar regarding the issues of bad faith, and the arbitrary and capricious standard of review employed in § 1132(a)(1)(B) cases. Further, Plaintiff's Motion to Strike is DENIED.

The parties are ORDERED to submit to this Court within fourteen (14) days a status report regarding what issues remain in this litigation.

ENTERED this 16th day of January, 1996.

/s/_____
Michael M. Mihm
Chief United States District Judge